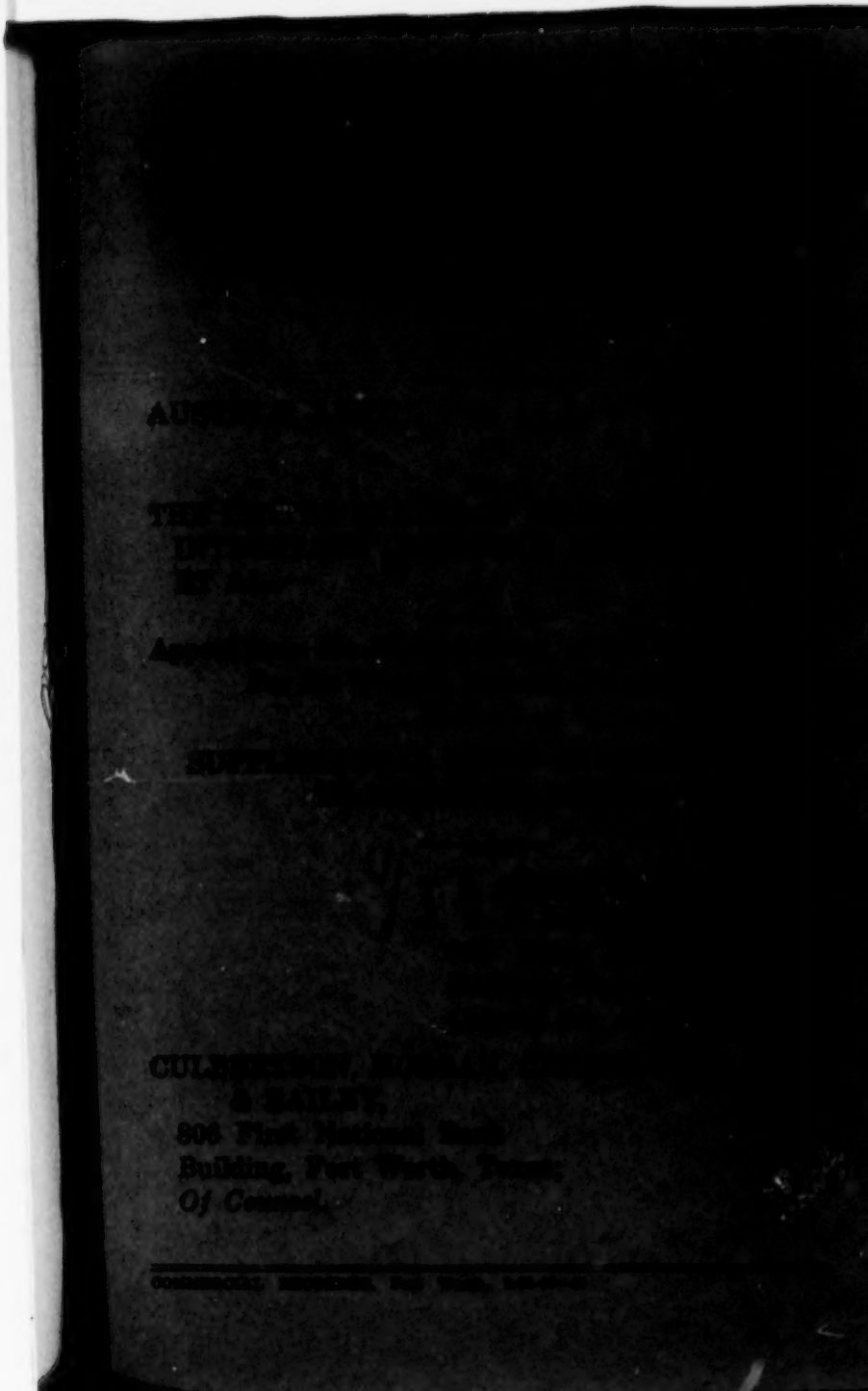

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

NO. 803

AUSTIN F. AKIN,

Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

Appeal from the District Court of the United States For the Western District of Louisiana

SUPPLEMENTAL BRIEF IN OPPOSITION TO MOTION TO AFFIRM

TO SAID HONORABLE COURT:

Austin F. Akin, appellant, asks leave of the Court to file and present this supplemental brief in opposition to the motion to affirm. We heretofore filed an answer in the trial court to the motion, which has been printed and styled "Brief in Opposition to Motion to Affirm." The nature of the case and the fact that the record could not be printed earlier prevented our filing a brief at that time.

We said in our brief on this question that appellant was engaged in the one occupation of operating motor trucks in which he hauled as parts of a

common cargo, in the same trucks, at the same time, and between the same points, shipments for the general public and for Swift & Company and its subsidiaries under special contracts. There was nothing in the service rendered Swift which would distinguish it from the ordinary service afforded to the general public as a common carrier by the appellant. Therefore, the Interstate Commerce Commission and the Court should disregard the special contracts altogether and consider all shipments as evidence of his good faith operations as a common carrier. This they refused to do. If they had, the evidence would have been overwhelming in support of appellant's application. (See Exhibit 27, page .... of Record; also undisputed evidence shown in Appendix).

In its conclusion, No. 2, the Court held:

> "The Commission correctly excluded documentary and other evidence of contract carrier operations in the determination of plaintiff's status as a common carrier by motor vehicle on the decisive date of June 1, 1935" (P. 13, Statement of Jurisdiction.)

This was in direct conflict with the decision of the Interstate Commerce Commission in *Doyle Transfer Co., Inc.*, 29 M.C.C. 284; *Doyle Transfer Co. v. United States*, 45 F. Supp. 691. There the applicant sought a contract carrier permit because it had contracts like the one with Swift in this case. But the Commission and the Court held that he rendered no special service under his special contract that distinguished it from the ordinary service rendered to the

public generally as a common carrier, and it was a common carrier as to all shippers. The Commission said:

> "It is the *inherent nature of the carriers service, rather than the existence of one or more contracts*, which determines its status. Neither the mode of receiving, transporting, and delivering of freight, the type of commodities transported, the class of shippers served, nor any other feature can be pointed to as distinguishing applicant's service from common carriage. *Although applicant has a contract with a shipper*, the service which is the subject matter of the contract Under all the circumstances, we conclude that applicant's operations are those of a common carrier by motor vehicle."

In a suit to set aside the order, the Court held:

> "The Commission in the instant case not only applied the statutory definition of common carriage thus set forth, which is essentially that of the common law, but went further and applied also the so-called secondary test of 'specialization' used by it to determine as to whether or not there was an actual 'holding out,' thus bringing the plaintiff within the terms of the statute.
>
> "This specialization test so applied has been held to consist either in the nature of the physical operation or in respect to the shippers served, and that in the absence of such, contract carriage could which would operate to distinguish it from the ordinary service afforded by common carriers. presents no special or individual characteristics not be found to exist."

* * * * * * * *

"In Pregler Extention of Operations, 23 M.C.C. 691 (695), it was held a contract carrier must perform 'special and individual service which is required by the peculiar needs of a particular shipper.'

"This strict construction of the definition of 'contract carrier' is also in accord with the declaration of policy found in Section 202(a) of the original Motor Carrier Act, and now found in Sec. 1 of the Transportation Act of 1940, 49 U.S.C.A., preceding Sec. 301.

"Again this strict construction appears also to be plainly within the intent of Congress."

Under either the statutory or specialization test, the appellant could not qualify as a contract carrier to entitle him to a permit. The Commission found:

"Although his contract carrier operations between the terminal points are authorized over irregular routes, applicant has used the same highways in rendering both types of service. He has also used the same vehicles, loading them with either or both classes of traffic, as offered at the time.

"Applicant claims to have made a distinction between these two types of service on and prior to the statutory date, in that each type was performed for a different class of shippers, as heretofore mentioned. In his common carrier service for the general public, applicant claims a 'general commodity' right on the ground that he has transported anything that was offered and has not limited his solicitation to any particular kind of commodities.' This solicitaton was performed by applicant and his drivers at

> the larger points on the route and by two local draymen of New Orleans. At all points where applicant purchased gasoline, he requested the filling-station operators to solicit freight for him. These methods of solicitation were employed from 1934 to 1936, at which time the local draymen at New Orleans ceased representing him." (See p. 5 of I.C.C. finding, R.).

This certainly was a sufficient holding out to be engaged in the occupation and business of a common carrier. (See also appendix showing undisputed evidence).

The Interstate Commerce Commission held in *Manufacturers Ry. Co. v. St. L. I. M. & S. Ry. Co.*, 21 I.C.C. 304:

> "The test to be applied in determining whether a person is a common carrier really is whether he holds out, either expressly or by a course of conduct, that he will, so long as he has room, carry for hire the goods of every person indifferently who will bring goods to him to be carried."

The Interstate Commerce Commission in *Craig Contract Carrier Application*, 28 M.C.C. 629 (637), said:

> "It is not necessary that he should have actually transported 'for the general public' but only that he conducted a transportation service in such manner as to demonstrate that in a general way it was, subject to his equipment limitations and the ability of the parties to agree on terms, available to shippers generally or *to all or a particular class of shippers.*"

Appellant clearly met that test as found by the Commission itself. It is thus held that it is the occupation or business in which a carrier is engaged, as shown by his holding out, that fixes his status as a common carrier. For example, this Court held in the *Tap Line cases*, 234 U.S. 1 (24), that it is the right of the public to use the facilities of the carrier and demand service of it, rather than the extent of its business, which determines whether or not it is a common carrier. This Court said:

> "It is insisted that these roads are not carriers because *the most of their traffic is in their own logs and lumber and that only a small part of the traffic carried is the property of others. But this conclusion loses sight of the prinicple that the extent to which a railroad is in fact used, does not determine the fact whether it is or is not a common carrier.* It is the right of the public to use the road's facilities and to demand service of it *rather than the extent of its business which is the real criterion determinative of its character.* This principle has been frequently recognized in the decisions of the courts."

Solicitation of business or the establishment in a community of a known place of business is a sufficient holding out. *Northeastern Lines, Inc. Common Carrier Application*, 11 M.C.C. 179. See 112 A.L.R. 91. *U.S. v. California*, 299 U.S. 189. It was held in *Interstate Commerce Commission v. A. W. Stickle Co.*, 41 Fed. Supp. 268, affirmed 128 F. 2d 155, that in determining whether a carrier is common or contract, "It is the effect of what a carrier

does and not what designation or name he may give to what he does that determines his good faith in endeavoring to engage in the transportation business as a private carrier." The holding out, as found by the Interstate Commerce Commission, put appellant definitely in the business or occupation of serving the public as a common carrier. Having that badge stamped upon him, he was such in every shipment he hauled for every shipper, including Swift. He gave Swift the same service he gave all other shippers. He put Swift's shipments in a common cargo in the same truck with that of other shippers and took it on the same trip to the same destination. Being in the business of giving service to the general public as a common carrier, he could not be, at one and the same time, a common carrier as to one shipper and a contract carrier to another in the same cargo. He necessarily and inevitably was a common carrier as to all. *Liverpool & Great Western Steam Co. v. Phoenix Insurance Co.*, 129 U.S. 397. This Court so held in *Bank of Kentucky v. Adams Express Co.*, 93 U.S. 174, and said:

> "What they are is to be determined by the *nature of their business*, not by the contract made respecting the liabilities which should attend it. Having taken up the *occupation*, its *fixed legal character* could not be thrown off by any declaration or stipulation that they should not be considered such carriers."

Again this Court held in *Liverpool & Great Western Steam Co. v. Phoenix Insurance Co.*, 129 U.S. 397, that:

> "When a carrier has a regular *established business* for carrying all or certain articles * * * it is a common carrier; and a special contract about its responsibility does not divest it of that character."

Being a common carrier as to all shippers, including Swift, all shipping documents of all shippers and all other evidence of all shipments before and after the crucial date, were necessary and should have been considered by the Commission and the Court on the question of appellant's good faith and the extent and nature of his operations. (See Exhibit 27, listing Swift shipments, R. ....).

Failure to apply these tests and these standards makes the order void whether there was evidence to sustain it or not. As this Court said in *United States v. Carolina Freight Carriers Corp.*, 315 U.S. 475, "Only when the statutory standards have been applied can the question be reached as to whether the findings are supported by evidence."

The Motor Carrier Act has carried forward the common law rule that one who is in the business of serving the public generally as a common carrier cannot, at one and the same time, be a contract carrier as to one shipper in a common cargo in a truck, while being a common carrier as to all other shipments in the same cargo in the same truck going to the same destination.

By the express language of *Sec. 203* of the *Motor Carrier Act* (49 U. S. C. A. 303), one who holds himself out as being in the business of hauling for

the general public cannot ever be a contract carrier even if he hauls under a special or individual contract, as was done for Swift. It defines a contract carrier as "any person, *not included under paragraph 14 of this section*, who or which under special and individual contracts or agreements" transports for hire. Therefore, if the carrier is included under paragraph 14, he cannot be a contract carrier even if he hauls under special or individual contract. Paragraph 14 defines a common carrier as one who *undertakes* to transport for the general public. Therefore, one who *undertakes* to transport for the general public is expressly excluded from the definition of a contract carrier, regardless of his individual or special contract or the class or nature of the shipper or his freight.

Appellant was therefore exclusively a common carrier as to all shippers under both the common law and the Motor Carrier Act, and could not legally be part one and part the other, for under either law, "Ne'er the twain shall meet."

This is therefore not a dual operation such as is controlled by *49 U.S.C.A.*, paragraph 310. It does not require both a certificate and a permit to do what appellant has been doing. In fact, the Commission has no authority to give him a permit, since he is specifically excluded from paragraph 15 of the Act on account of his undertaking to serve the general public under Sec. 14 of the Act.

We believe this is a very substantial question which we should be allowed to brief fully and argue

orally. Certainly no summary judgment should be entered without exploring the question.

The Motion for Summary Judgment substantially joins issue on this very question. On page 5 it alleges:

> "The fact that common and contract carrier operations are performed by one person at the same time, in the same vehicles, over the same routes and between the same points, does not destroy the elementary differences between the two services; the basic differences, as heretofore noted, are found in the characteristics of common and contract carriers."

ON SUBSTANTIAL PARITY

The appellant claims his grant by the Congress of the right to continue to do in the future substantially what he did before June 1, 1935. That has been called by this Court substantial parity of operations. *Alton R. Co. v. United States*, 315 U.S. 15. This substantial parity has reference, however, to the "basic characteristics" of the service and not to comparable tonnage or classes of commodities handled. *United States v. Carolina Freight Carriers Corp., supra.* This Court, in *Noble v. United States*, 87 L. Ed. 1277, puts it on the basis of "the characteristics of the enterprise" in which the carrier is engaged, which is exactly what we contend the Commission and the Court refused to do here, and is another way of saying occupation or business, or as paragraph 14 of the Motor Carrier Act calls an undertaking. This Court there pointed out that failing to observe the "prior activities" of the car-

rier "would make a basic alteration in the *characteristics of the enterprise* of the contract carrier—a change as fundamental as we thought was effected by a disregard of the *nature and scope of the holding out* of the common carrier in United States v. Carolina Freight Carriers." In that case the Court was as careful to limit the contract carrier's operation to "the pattern" which it had prior to June 1, 1935, as it was to keep the Interstate Commerce Commission from whittling away the carrier's rights in the Carolina Freight case when it had been actively soliciting whatever it could get at any points. The Court said in this latter case that "it does violence to its *common carrier status*" thus to whittle away its rights, and "Such pulverization of the prior course of conduct changes its basic characteristics." How appropriate this language is to appellant's operation!

We demonstrated above what this "status" or "pattern" or "undertaking" or "enterprise" or "holding out" was, as fixed by the common law as well as the Motor Carrier Act. The Commission and the Court "pulverized" it and "whittled" it away by dissection and by Jim Crow reasoning segregated a part of the whole and put to one side all evidence of this part. It then made the amazing and remarkable holding that the freight hauled for the general public, not being as great in point of tonnage or number of shipments as for Swift, it would treat all of the common cargo as contract carrier shipments.

And after the effective date it would hold a complete cessation of common carrier operations because the ratio of common carrier shipments to those for Swift had not remained constant. The Commission and Court thus ignored the basic law that a carrier who undertakes and holds himself out to haul for the general public and hauls some as such becomes a common carrier to all shippers.

This misconception and misapplication of the basic law permeates the whole case to such an extent as to render the order void without examining the record and briefs to ascertain whether there was substantial evidence to support the order. Cf. Carolina Freight Carriers case. Certain it is that a very substantial question is raised which demands careful briefing and argument.

ON VIOLATING RULES OF EVIDENCE

It would extend this brief unduly to attempt to quote from the record to show, as we contend, that the Commission refused to try the case according to established modes and standards in several particulars. We will do so if allowed to brief and argue the case.

The Commission accepted negative testimony to impeach positive fact testimony and refused to consider such positive evidence which it regarded as thus impeached. All evidence in the record was offered by appellant except such as was offered by protestants for impeachment. Therefore the case was not tried on conflicting fact evidence but on

such impeaching evidence offered to rebut positive fact evidence.

This Court held in *Stitt v. Huidekoper*, 17 Wall. (U.S.) 384, and in *Aetna Life Insurance Co. v. Ward*, 140 U.S. 76, that where one group of witnesses testify to positive facts and others to negative, the positive should control. And this applies even between parties. *Penn. R. Co. v. Chamberlain*, 288 U.S. 333. *Int. Shoe Co. v. Federal Trade Com.*, 280 U.S. 295. The Commission found: "Applicant commenced trucking operations about 1932, and was registered under a code of fair competition for the trucking industry in 1934." The Motor Carrier Act provides that "if such carrier who registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be at all was made to impeach. This uncontradicted evidence of bona fide operation to be considered in connection with the issuance of such certificate." This made a prima facie case. It would require evidence to rebut it.

In appendix we list evidence which no attempt and unimpeached evidence cannot be disregarded and it was arbitrary and unreasonable and a violation of the modes and practices required in such cases, for the Commission and the Court not to give effect to such evidence.

This Court held in *C. & O. R. Co. v. Martin*, 283 U.S. 209, that: "We recognize the general rule, of course * * * that the question of credibility of witnesses is one for the jury alone: but this does not mean that the jury is at liberty under the guise

of passing upon the credibility of a witness to disregard his testimony when from no reasonable point of view is it open to doubt." It pointed out that the witness was not impeached and nothing reflected unfavorably upon him. The same is true of the witnesses whose testimony is shown in the appendix. These was no evidence contrary to this evidence. It it uncontradicted.

In addition to all of this, the Commission excluded all shipping documents because some of them were copies when it was shown that he could not produce the originals, and refused to consider the shipments made by and for Swift shown on Exhibit 27, (R.).

A very substantial question is raised on this point which cannot properly be disposed of by summary judgment.

Wherefore, appellant prays that this brief be filed and considered and the motion to affirm by summary judgment overruled.

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APPENDIX

We will now examine the evidence to see what witnesses were uncontradicted and unimpeached. References are to pages of the record before the commission.

J. P. Maloney of New Orleans was called as a witness at the hearing in June of 1940 (R. 52). Mr. Maloney was then and is now Traffic Manager for Swift & Company at that point and had been with Swift & Company for some thirty years. He testified that Mr. Akin had hauled everything that they had ever tendered him, which included a list of 250 different commodities (R. 53), even including machinery (R. 53). The Applicant according to Mr. Maloney had handled many of these 250 commodities not only including the direct, immediate products of the packing house, that is, fresh or smoked meats, but also many other items, witness mentioning in addition to machinery, bags, the big movement having been from New Orleans, or from Harvey, which is a New Orleans suburb just across the river from New Orleans, to Fort Worth and Dallas (R. 54). Applicant was handling bags for Swift & Company from New Orleans to Fort Worth and Dallas before June 1935, not under contract, but as a common carrier (R. 55). The Applicant had also handled fertilizer for Swift & Company on the same basis (R. 56). The record throughout shows that Applicant was handling fertilizer in interstate commerce from the Shreveport Fertilizer Works and from the Federal Chemical Company in Shreveport. These were entirely different

companies from the fertilizer which was handled for Swift & Company (R. 57). The witness said "if we would ask him to move a plant, if he thought he could do it, he would attempt it and try it" (R. 60).

Swift & Company have a large refinery, fertilizer, sulphuric acid and bag factory 'on the west bank of the river at Harvey, Louisiana' (R. 61) and shipments were handled by Applicant from this plant. Fulton Bag and Cotton Mills sometimes make shipments of bags to Swift & Company (R. 61), Swift purchasing this commodity from Fulton Bag. The Applicant had hauled soap which originated at Chicago, distributed through Baton Rouge, Louisiana to such points as Alexandria and Lake Charles (R. 62). Apparently cheese had been handled by the Applicant which is made by Swift & Company in Dallas, and a good many other points, including Enid, Oklahoma, and some of which also comes from Wisconsin and some from Mississippi (R. 62-63). There had also been movements of frozen eggs out of Fort Worth, which moved in 5 gallon cans (R. 63). The soap shipments from Chicago moved down the river to Baton Rouge and then moved out of Baton Rouge to Louisiana points (R. 63).

Mr. Maloney was recalled to the hearing on June 24, 1943 (R. 282), for cross-examination by the Protestants.

He testified that Swift & Company had had a contract with the Applicant from 1934 down to date (R. 283); that Swift & Company had used Applicant's service regularly and continually. In fact, Mr. Akin had two contracts with Swift & Company, one of

which was from Harvey, Louisiana, the other covering transportation from Fort Worth (R. 284). Quite apparently no contract covered the shipments from Chicago. All commodities handled out of Harvey, Louisiana had been handled under the contract (R. 285). The Applicant had handled several hundred items, including furniture (R. 286). Applicant had handled corned beef and roast beef for Swift & Company which had arrived in New Orleans on steamers from South America, delivering shipments of this character to Monroe, Shreveport, Alexandria, Baton Rouge, and other places (R. 287). Quite apparently no contract covered this movement.

The next witness called by Applicant was Samuel S. Seither (R. 64). Seither lives at New Orleans, where he has been engaged in the transportation business for a number of years and knew the Applicant prior to June 1, 1935 (R. 65). He testified that the Applicant had office arrangements with him at New Orleans prior to June 1, 1935. In this connection see Exhibit No. 4. When asked what commodities Seither solicited for movement over Applicant's line, the witness said that he would pick up shipments and then deliver them to Akin at the dock for transportation (R. 65) and that he solicited "all general commodities; anything; sewing machines, dishes, bags, anything that would come in there" (R. 65-66). The Applicant continued to have terminal arrangements with Seither after June 1, 1935 and in rendering a pick-up and delivery service in the city of New Orleans, also rendered that kind of a service for the Applicant, the Applicant paying the pick-up and delivery charge (R.

66). Seither or someone of his office force answered telephone calls for the Applicant at New Orleans and turned those calls over to Applicant's drivers when they came in (R. 67). After June 1, 1935, although Seither was not actively soliciting business for Applicant, he did nevertheless give prospective shippers routings upon their request and "would say 'Akin Truck Line'" (R. 68).

The witness particularly mentioned having picked up bags from the Fulton Bag Company as well as some furniture, a radio or sewing machine (R. 68). He also remembered picking up some tallow "off the steamship wharf" which was transported by Applicant. The witness identified a shipment on freight bill No. 2070 dated May 23, 1935 as a shipment which Applicant had received from him for transportation. He also identified shipments on bills dated May 11, 1935 and March 28, 1935 (R. 70). The witness said that at times the Applicant had no regular forms for billing and so the bills were made on his forms under the name "Modern Motor Transportation Line," thus identifying the various bills in the record on that particular stationery.

The witness had himself been engaged in motor transportation under the name "Modern Motor Transportation Line" since about 1931 (R. 70). The witness had operated in Louisiana, Mississippi and Arkansas (R. 71), but at the time of the hearing at which this testimony was given in 1940 he was operating only as a contract carrier in Louisiana (R. 71). During 1935 the Applicant used the witness' terminal in New Orleans and the witness picked up, signed for, and also delivered home merchandise for the Appli-

cant (R. 72). Applicant paid Seither for the terminal and solicitation services which were rendered on his behalf (R. 75).

As soon as Applicant's drivers arrived in New Orleans and made their deliveries, they came to his terminal and he notified them if they had loads to pick up (R. 75), and Applicant would notify Seither if he had something for Seither to pick up. These arrangements first started in 1934 (R. 75).

On cross-examination it was shown that Exhibit 4, the agreement between the witness and the Applicant, was in effect until June 1, 1935 and the exhibit was received in evidence at page 79 of the Record. Still further on cross-examination the witness identified a shipment dated May 3, 1935 at page 3 of Exhibit 3 of the original hearing consisting of a shipment of boxes moving from Shreveport, Louisiana to Dallas, Texas. The shipment appeared upon a billing carrying a masthead of Modern Motors and was marked "Mod. Motors to Akin Truck." (R. 79). Modern Motors apparently brought the shipment from New Orleans to Shreveport and interlined it with Akin at Shreveport, destination Dallas (R. 80). Such handling of shipments seems to have occurred during the first half of 1935 (R. 80). On the other hand, it appears from Seither's testimony that shipments were handled by Akin direct from New Orleans and also which are billed on the Modern Motors billing (R. 80). The arrangement between Seither and the Applicant on which Seither collected a commission did not cover freight that their drivers solicited and called in and picked up directly by Applicant's drivers at New Or-

leans (R. 81). And this is true, many of which shipments apparently were billed on the stationery of Modern Motors Transportation Company because a great deal of the New Orleans billing was being handled by Seither on his own bill heads (R. 81).

On cross-examination at the 1943 hearing Mr. Seither reiterated that he was engaged in business as a contract carrier in Louisiana and also doing a local drayage business in the City of New Orleans (R. 291). It again appeared that this particular witness who had been operating in Louisiana, Mississippi and Arkansas filed an application with the Interstate Commerce Commission under the grandfather clause of the Motor Carrier Act, but that application was denied (R. 291-292). About the same facts appeared on cross-examination from this witness as had appeared on the original hearing. The cross-examination on this later hearing developed that Seither picked up freight for the Applicant "from the wharves and around town, if anybody rang up for his service, why, we told them he had service from New Orleans to Fort Worth and Dallas" (R. 293). At the same time that Seither was doing this he was also engaged in securing freight for other carriers, he being engaged in that connection in business as a transportation broker (R. 293).

Upon being questioned as to how some of the loads for Applicant were handled the witness said " We would ring up a customer, if Akin's truck was coming in, and he would be too late to load up, he would ask me to pick it up, and we would pick up this load and load it on his truck, and we would call the company up and get the load, and arrange the load for

him" (R. 294). He had similar arrangements with at least two other named carriers (R. 294-295). According to the witness he discontinued this type of solicitation for the Applicant because in 1936 the Commission ruled that he could not engage in business as a transportation broker (R. 295). The witness customarily billed the freight for the Applicant (R. 298). Occasionally using his own bills because the Applicant did not have any printed bills at the time and when using his own bills he would stamp or write the name of the company which hauled the load on his bills (R. 296). Even though the witness did not render this service for the Applicant in 1936, nevertheless the Applicant did have the use of the witness' terminal facilities and telephone where calls were taken and from which service was rendered (R. 297). Solicitation was usually by telephone, except as the witness met shipper friends when the witness would suggest that shipments be made by Akin's line (R. 299). It appears that witness moved shipments on his own trucks from New Orleans to Shreveport during the year 1934 where they were interlined with Akin (R. 300). That practice apparently was discontinued in the beginning of 1935.

Even after Akin moved his terminal facilities elsewhere the witness continued to take calls over his telephone where customers were accustomed to call for Akin's service and would tell the customer what the correct telephone number was (R. 305).

When asked if he did what he could to secure shipments for the Applicant the witness answered "that is right." (R. 307). And he did the same thing as

broker for other carriers for whom he was attempting to secure business at the time. The witness was paid for this service (R. 308).

The first witness called by Applicant at the hearing on November 22nd was Ernest McCoy. McCoy lives in Dallas. He had been theretofore employed in Fort Worth by Swift & Company and also by Fort Worth Wholesale Grocery Company (R. 498). He was employed by the Fort Worth Wholesale Grocery Company from the latter part of September or the first of October 1933 until about the 1st or middle of August 1936 (R. 498). Witness was acquainted with the applicant, having first become acquainted with the Applicant the latter part of 1934 or the first part of 1935, the witness having met the Applicant at the time the Applicant's truck was unloading at the dock of the grocery company (R. 499). This meeting having occurred when "we were receiving some merchandise from him" (R. 499-500). The witness could not remember what kind of merchandise was being received at the time, but was shown a shipping document dated March 1, 1935 which is in the original records and numbered A-17 and also had a number 1885 on it and identified his signature as being the party receiving the shipment which consisted of 527 boxes of macaroni products (R. 500). The shipment was from National Food Products Company at New Orleans to Fort Worth Wholesale Grocery Company, Fort Worth (R. 501). The witness stated definitely that he received that shipment on behalf of his employer (R. 501). He also stated that he had received a number of other shipments over the Akin line, but

of course, after the lapse of more than eight years he could not remember the dates (R. 501). The witness also testified definitely that he received other shipments over the Applicant's line and that other shipments consisted of other commodities (R. 503). After about the first eight or ten months of witness' employment by the Fort Worth Wholesale Grocery he was warehouse foreman and assistant manager (R. 506).

The witness did testify definitely that he received shipments over the Akin Truck Line for the Fort Worth Wholesale Grocery Company during the years 1934, 1935 and 1936 (R. 506). He also testified that his company not only received macaroni products, but received canned shrimp and "Louisiana products generally" over the Akin Truck Line that came out of that territory (R. 507). He also testified that during 1934, 1935 and 1936 that Akin solicited the business of his company (R. 507). He also stated that within his knowledge that Akin solicited business from the "Naples Supply Company". Actually that name is Waples Platter Company, a wholesale grocery company in Fort Worth (R. 507). The witness also had occasion to observe Mr. Akin's trucks during those years when Akin was unloading commodities at the docks of the Fort Worth Wholesale Grocery Company and saw and was able to determine what kind of commodities were on the truck. But for no good reason the Joint Board did not permit the witness to answer as to what he saw on the trucks. (R. 508).

Another witness was Elbert Martin (R. 517). The protestant was attempting to impeach his testimony

by bringing the City Marshall of Wills Point who testified he had lived at Wills Point for years and never heard of this fellow. The Commission correctly did not treat this as impeached. It could not do so under the law of Aetna vs Ward, supra. However, the witness Martin testified that he lived in Honey Grove, was a farmer and graduate of Texas Tech at Lubbock and had known the applicant approximately 15 years and knew he was engaged in the trucking business. (R. 518). He stated that he had received some shipments over the applicant's line originating in Louisiana (R. 519). One of these shipments was a shipment of pecans which he received at Wills Point. He had also received a shipment at Mineola (R. 519). He was delivering corn which he had grown on his own farm at these points and had these shipments made by Akin Truck Line, having met the truck at those points and received the shipments (R. 519-520). The witness had been in Louisiana on a fishing trip and saw some pecans which he wanted and he had the driver for the Akin Truck pick them up, bring them to him and one shipment was delivered to him at Mineola and one at Wills Point (R. 521). At another time the witness's wife was in New Orleans, Louisiana and bought some antique furniture and had it shipped by Akin Truck, that shipment being sometime in 1935. The witness identified the shipment in connection with the time he built his home in 1934 (R. 522). That shipment seems to have been interlined at some point, the actual delivery having been made by Northeast Texas Motor Lines (R. 523).

On cross-examination it was shown that Martin had known the applicant since 1928 or 1929. The witness

reiterated having received the shipments at Mineola and Wills Point (R. 524) and again stated that he had arranged for them while on a fishing trip in Louisiana (R. 524). He reiterated that he met the truck at the points indicated to receive his shipments because it was convenient for him to do so in handling some corn and grain at those points. (R. 527). He testified definitely and positively on cross-examination that the documents shown in the record as representing shipments to him were received by him and signed for by him. (R. 527). And also stated positively that he did receive those shipments (R. 529).

The next witness called by the applicant was J. A. Williams (R. 542), who lives at Shreveport, Louisiana, and has lived there since 1917. He had known the Applicant since 1931 or 1932. He was engaged in the oil field business in drilling, and cleaning out wells (R. 543). He had been engaged in that business since 1926, having pursued the business in Arkansas, Louisiana and East Texas (R. 543). He had occasion to make shipments on the Akin Truck Line, having made such shipments from beginning in 1932 on down through the year 1938 (R. 543). He stated that he had shipped equipment by applicant's trucks from Louisiana to East Texas and from East Texas back into Shreveport (R. 544). Some of these shipments had gone to Willow Springs which is a point just west of Longview, Texas (R. 544). The witness was handed an original shipping document dated October 26, 1934, which was marked No. 17. The document appears on Exhibit No. 26 which is an abstract of the original documents and on the 1st page thereof. The ship-

ment consisted of oil field equipment. It was "6-4-6 pumps and fittings." (R. 544). The witness stated that he signed the instrument and that the shipment moved (R. 545). And that he received the shipment in Shreveport (R. 545). The shipment moved from Willow Springs, which is near Longview (R. 545). The shipment is still further described as being a Worthington pump and one gasoline pump and repair parts (R. 545). The witness definitely stated that he paid the freight charges (R. 546). This kind of testimony cannot be disregarded nor the documentary evidence viewed with suspicion when so supported.

The witness was then handed an instrument identified with No. 20 on it, the instrument being dated November 5, 1934. The witness identified his signature on that instrument. The instrument is abstracted on Exhibit No. 26 on the bottom line of the first page. The witness had also received that shipment from Willow Springs, near Longview at Shreveport, Louisiana. The shipment consisted of drilling hose and other equipment, including bailing line (R. 547). All of this was material which was used by the witness in his own business and on which he paid freight charges to applicant (R. 545).

The witness was then handed an instrument numbered 42, abstracted on Exhibit No. 26 near the top of page 4 and dated February 3, 1934. He identified his signature on that document and stated that it represented a shipment which he had received (R. 548). The origin was Gladewater, Texas and was shipped from Gladewater to Shreveport. It consisted of fittings, drilling bits; also pipe connections and oil

field tools (R. 549). The witness paid the freight charges to the applicant.

The witness was then handed an instrument with the number 104 upon it, representing a shipment made May 5, 1935, and abstracted about one-third of the way down the page of page 6 of Exhibit No. 26. He identified his signature on that instrument, stated that the instrument originated at Fort Worth, Texas and was delivered to him at Grand Cane. The shipment consisted of about 30 head of sheep which he had purchased in Fort Worth (R. 549-550). Grand Cane, Louisiana is a point located on Highway 177 about 40 miles south of Shreveport (R. 550). They were delivered to the witness's farm and the witness paid applicant the freight charges.

The witness was then handed a shipping document dated December 6, 1936, also abstracted in Exhibit 26, which the witness identified and said that the shipment originated at Willow Springs, that it consisted of sucker rods, pumping and other equipment and was delivered to him at Shreveport, Louisiana (R. 551). This shipment was apparently picked up between Willow Springs and Gladewater, Texas from a location where some work was being done (R. 551).

Witness was also handed a shipping document dated June 13 1938, also abstracted in Exhibit 26. The instrument and the witness's signature were identified. The shipment consisted of a circulating pump and tank. (R. 552). The shipment moved from near Willow Springs to Shreveport, Louisiana. The shipment was received by the witness at Shreveport and the freight charges paid (R. 553).

Upon being asked whether or not he had made other shipments by applicant's line he stated "Well, all I know is that he has hauled stuff for me many times." (R. 553). The witness said that he had never signed any kind of papers at any time in blank, that he had known the applicant but not very well, although he had seen him quite often, and that he did know that the applicant was engaged in the trucking business. (R. 554).

On cross-examination it was shown that the sheep movement in question was sheep delivered to the witness's farm which came into witness's possession as an inheritance and been owned by the family since 1878 (R. 556).

The next witness called by the applicant was B. F. Stroope (R. 571). Stroope then lived at Kilgore, Texas where he is operating manager for the R. S. Martin Estate. In 1934 and 1935 he was Secretary-Treasurer of the Morgan Ice Company (R. 572). Morgan Ice Company had plants at Longview, Texas and at Gladewater, Texas. He first beame acquainted with this applicant in the early part of 1935 (R. 572). He was first approached in connection with this application by Mr. Griffin who was sitting in the Hearing Room when Mr. Stroope took the witness stand. (R. 572).

The witness became acquainted with the Applicant in Shreveport early in 1935, that being occasioned by the fact that Mr. Wade, President of the Morgan Ice Company, went to Shreveport and made contact with the Applicant (R. 572). The purpose of the visit and of the contact was that the Morgan Ice Company

was in an ice fight with the "Shreveport crowd here," and they wanted some one to haul ice to Shreveport (R. 573). During 1935 witness's company did sell ice to the Economy Ice Company at Shreveport and shipped it from Gladewater to Shreveport on Applicant's trucks (R. 573). In fact, according to this witness, they shipped ice to Shreveport both from Gladewater and from Longview. The Gladewater plant also "bought a lot of ice from the Southern Ice & Utilities Company at Tyler" and shipped it to Shreveport as well as getting some ice from Gilmer and Mount Pleasant which was shipped to Shreveport. All of this ice however, except probably the Longview shipments, were picked up by Applicant's trucks at Gladewater. (R. 574). The witness did not remember who paid the freight charges on the ice (R. 575). Morgan Ice Company also shipped some salt from Shreveport to Gladewater and this witness paid the freight charges on that particular hauling. That was in the spring of 1935, but the witness could not fix the date any better than that. After all that had been a long time. Morgan Ice Company also shipped either a Rotray or Viking pump from Shreveport to Gladewater (R. 575). The witness received the pump on behalf of the company and paid the freight charges (R. 575). The witness then identified a number of invoices showing shipments of ice by the Morgan Ice Company in Gladewater to Shreveport (R. 576-582 inclusive). The witness identified various invoices as representing shipments of ice made on the dates shown from Morgan Ice Company, Gladewater, to Economy Ice Company, Shreveport, Louisiana (R. 582-3).

The protestants tried to impeach this testimony by a man named Butcher who testified that he never heard of the Economy Ice Company and that an ice company couldn't economically transport ice to Gladewater. The Commission did not consider this sufficient impeachment because it found the ice moved as alleged, but was sporadic. Moreover, this was negative testimony and could not be considered as impeachment.

The reason this ice was moving was because of the so-called ice war and was brought about by the fact that American Service Company of Shreveport (R. 585), "were shipping it out of here and dumping it on your market" (R. 585-6). The witness Stroope had charge of all the loading and billing of this ice and stated definitely that each instrument identified represented an actual shipment of ice (R. 587). The Economy Ice Company at Shreveport apparently belonged to Mr. Wade (R. 589), already identified by witness Stroope as being President of Morgan Ice Company, although the witness did not know for sure who the Economy Ice Company was, but knew the Economy Ice Company grew out of Mr. Wade's idea. When shipments were made he would sign an invoice or a receipt, which are the instruments or copies of the instruments which are in the Record. (R. 588). Regardless of anything else Stroope knew that the ice moved to Shreveport because he said that he himself went to Shreveport and "gave two loads away on my way one time to El Dorado." (R. 590). The witness spoke of a "little house" which he identified as being the Economy Ice Company station "in the Pines Addition" at Shreve-

port. The witness did testify that all of those ice bills or invoices or sales tickets, whatever they may be termed, were made on the date that the shipment was made and not at any time later (R. 592). But there is nothing strange that the witness after all those years had forgotten the exact facts with reference to that matter. It was not important. He did know that the shipments moved and that is all that is important, and he did say that if the records of the Morgan Ice Company were checked copies of those records would be found (R. 592). He also said that all of those bills bore his signature (R. 593). The witness also said that when the ice was being shipped to the Economy Ice Company at Shreveport that in fact it was being shipped to Mr. Wade and that actually in fact it was Morgan shipping ice to itself at Shreveport (R. 594).

At this point the protestants tried to make much of the fact that one of the tickets covering the ice was printed at a date later than a date upon which the shipment moved.

The applicant had testified at a hearing before the Commission in 1940 that in preparing for the hearing he had gone to some of his shippers and obtained copies of the shipping records from their files. (R. 113-114). But the Commission correctly ignored that fact because of the proof given by the witness P. J. Palmer. Palmer lived in Shreveport where he had lived for 35 years. He had been connected with The Shreveport Fertilizer Works since 1926 as a salesman, but had also worked for the Polar Wave Ice Delivery Company during two summers, and with the Independent

Ice and Cold Storage Company at Shreveport (R. 601). In the summer of 1935 the witness was working for Polar Wave Ice Company. When asked if he was acquainted with the Economy Ice Company his answer was "Too much so." (R. 602). When asked what was the Economy Ice Company, if he knew, Mr. Palmer answered "Well if I can express it in my own language, it was a cut throat company formed by some East Texas interests which I later learned were from Longview and Gladewater, Texas, in retaliation for ice shipped there from here, that is, into East Texas." (R. 602). He said that the Economy Ice Company were selling ice at less than "our delivery prices" which caused an investigation to get the facts. Mr. Palmer himself carried on the investigation (R. 602). He says that ice was getting to Shreveport for several weeks "before we discovered it," and that his interest was to discover where it came from and "to see if we could make a little peace and stop this racket and we began to watch this little ice house." (R. 603). He first discovered this ice coming into Shreveport "the latter part of June or the first part of July." He saw trucks bearing the name "Economy Ice Company." Those trucks appeared on the streets of Shreveport some time around the first of June of 1935 and they were peddling ice "on our route." (R. 603). He said "you couldn't keep from observing them in that case."

When asked where he first found out where the ice was coming from the witness answered "Well, we set up for about two weeks nights watching every road out of here to discover them and to see where it was coming from and that is the way we found out. We

caught ice coming in here and also the trucks going out and we followed them." (R. 603-4). The witness says they did follow them all the way to Gladewater and that was where the ice was coming from. (R. 604). The witness also says that he was acquainted with the applicant here. That he knows that he was engaged in the trucking business. He says that the Applicant had hauled fertilizer for the Shreveport Fertilizer Works, merchandise which the witness himself had personally sold. That the Applicant had been hauling fertilizer to his knowledge in 1934 (R. 604). And that he made deliveries of fertilizer from Shreveport to points along U. S. Highway 80 and beyond. He particularly enumerated some of these points as Mineola, Haskins, Alba and Wills Point. (R. 605). Within the witness's knowledge this particular movement began in 1934 and had continued to date (R. 605). Witness had observed Applicant's trucks in 1934 and 1935 in particular and had been at some of the points which he mentions when Applicant's trucks were at the trucks of the Shreveport Fertilizer Works where he had occasion to observe them, and that he knows in addition to fertilizer he had noticed other commodities on the trucks and this observation went back as far as 1934 (R. 308).

On cross-examination, stating that he had worked for Shreveport Fertilizer Works since 1926 (R. 607). That he knew that Akin Truck Line had hauled fertilizer for that company since 1934 (R. 608). That Mr. Shallenberger was vice-president or manager of the Shreveport Fertilizer Works (R. 606). That the ice company that he worked for in 1935-6 and 1937

was a delivery company and that he also worked for Independent Ice Company (R. 609). That the delivery company, meaning the Polar Wave Ice Delivery Company, was dissolved in 1936 (R. 609). He was postive about being connected with the ice business in 1935 and that he made the investigation in connection with the Economy Ice Company in that year. When asked why he was so sure about the year he answered that he was just as sure of that as he was that this year was 1943. (R. 610). When asked whether or not on some of his personal sales of fertilizer he specified the routing as Akin Trucks Line he answered "Yes sir." (R. 10). He did not know just who Papa Truck Line was, but knew that the Shreveport Fertilizer Works also made shipments over the Papa Line (R. 610). He had never made any shipments personally over the Akin Line (R. 611).

Thereafter C. D. Shallenberger, Vice-President of the Shreveport Fertilizer Works, came to the witness stand and testified that he had been connected with the Shreveport Fertilizer Works since 1902, a span of more than 40 years (R. 613). He had been Vice-President of the company since 1914 or closely approximating 30 years. He had known the Applicant since "the late '20's" or in other words ten or more years. He knew that the Applicant was in the trucking business and he had had occasion to employ the Akin Truck Line on shipments for his company. These shipments going from Shreveport to both Texas and Arkansas. None of his shipments had gone West of Dallas (R. 614). Shipments of this character were moving in 1934 and in 1935. That is as far as this

very capable witness was permitted to testify due to the fact that he did not have his records with him so that he could testify from records.

The next witness was Mr. Leo Levy of New Orleans, Louisiana connected with the Crescent Paper Box Factory, Incorporated (R. 620). Mr. Levy was under subpoena to appear at the hearing on behalf of the protestants, but observing his presence the Applicant called him to the stand. Mr. Levy was working for Crescent Paper Box Factory in 1935-1938 and in fact from 1933 down to the date that he was testifying. (R. 631). His company manufactured paper boxes which were sold and shipped by the company in interstate commerce all over the country, and made such shipments both to Dallas and to Fort Worth (R. 621). His company used the services of various truck lines, including that of Akin (R. 622). He used the services of Akin Truck Line on Fort Worth and Dallas shipments in 1934-1935 through Modern Motors Transportation Company. Due to the fact that "our commodity is very bulky and because of the amount of space it requires and its feather weights none of the truck lines wanted it and we were tickled to find someone who would handle it, and finally after having several lines refuse to take the shipments we contacted the Modern Motor Transportation Company and they said Akin would handle it direct for them and that is how we got in touch with Akin." (R. 622). This contact was made through Samuel S. Seither, a witness whose testimony we have already reviewed, and in connection with which reference has been made to Exhibit 4. The witness says that Seither was associated with

Modern Motors Transportation Company in 1934-1935 (R. 623). When asked if he had ever seen Mr. Akin in New Orleans he answered "Mr. Akin used to be a truck driver and a pick-up man and handled the shipments himself and put them on his own truck I believe" (R. 623-4). The witness said that Mr. Akin himself had picked up these shipments for Fort Worth and Dallas. He also said that he recognized the signs on Akin's trucks.

With this type of testimony the protestants who had subpoenaed him excused him without question.

The next witness was J. Edge. Also subpoenaed by the protestants but called to the witness stand by the Applicant (R. 625). Mr. Edge lived in Dallas and had lived there since about 1940, prior to which time he lived at Forney. At the time he was testifying he was a Flight Instructor at British Flying Training School at Terrell, Texas. Although the record shows Carroll (R. 625-6). He was engaged in the service station business in Forney and also at Dallas. He had known the Applicant since 1934 when he started his service station business at Forney (R. 626). He says that he more particularly knew Akin's Trucks than he did Akin (R. 626). The trucks stopped at his filling stations, both in Forney and at Dallas. He says that the Applicant was engaged in the trucking business from the time he first knew him in 1934 (R. 626). When asked if he ever saw Mr. Akin himself on the trucks his answer was no, that they were usually driven by some drivers (R. 626). He testified that there were occasions when he received shipments by Akin's Trucks. He identified a shipping document

dated October 2, 1934 and his signature on the docket and testified positively that he received and signed for that shipment at Forney. (R. 627). He identified another bill dated December 20, 1934 and his signature thereon, but said that although he receipted for the shipment that he did not personally receive it, but that it was taken by the boys at the station (R. 628). He said he could not personally say of his own personal knowledge that shipment moved or not (R. 629). He identified a bill dated December 22, 1934 covering shipment of gasoline pump, gasoline hose, a nozzle and grease gun, and said that he did receive that shipment (R. 629-30). He also identified an instrument dated April 23, 1935 showing shipment of a 1000 gallon tank, stated that the signature was his and that he did receive that shipment (R. 630). He identified a document dated January 3, 1935 and said that he was sure that he received that shipment (R. 631). He also stated that he at times received shipments at his station which he signed for but which were actually intended for other persons (R. 631).

The documents above referred to with their dates are the documents from which Exhibit No. 26 was compiled and those documents are all numbered the particular numbers on the numbers identified by the witness, being Nos. 15, 34, 37, 82, 88. The witness was asked to examine each of those documents and to state whether or not he had ever signed any of those documents in blank, and the witness stated that he had not. (R. 632). The witness was asked if he had ever signed any document for Mr. Akin in blank and the witness stated

that he had not (R. 632). He was then asked if he had ever signed any instrument in blank and he said "No, sir." (R. 632).

The next witness called by the Applicant was O. D. Thorn. Thorn lived at Shreveport where he had lived since 1929 and where he was acquainted with the Applicant (R. 657). The witness had known the Applicant since about 1930 or possibly he became acquainted with him as late as 1933 (R. 657). He stated that at the time he first met the Applicant and knew him that the Applicant was engaged in the trucking business in Shreveport and that he had occasion to use the trucking facilities of the Applicant (R. 657). The use which the witness had made of Applicant's services was in connection with pipe line contracts in East Texas in 1934 (R. 657). The first business which the witness did with Applicant was to have Applicant haul some household goods for him from Shreveport to Turnertown, which is near Henderson. That was in 1934 (R. 658). That was just sufficient furniture to take care of himself, his wife and child while they were on a job there (R. 658). Witness had also had the Applicant to haul some tools from Shreveport, Louisiana to Turnertown and to Jonesville where he was working at the time for Excelsior Refining Company and also the Lisbon Gasoline Company (R. 658). Shipments were transported by Applicant for the witness from time to time as they were needed in 1934. He fixed the time of the hauling in connection with the time that he was working on the jobs mentioned (R. 659).

The Applicant had hauled the shipments from Shreveport to Texas and also from Texas back to Shreveport (R. 659).

In the latter part of 1934 the witness finished the contracts in Texas and in 1934 started in business in Shreveport. That was an electrical phonograph business (R. 80.) The witness stated that Applicant continued to solicit his business, but that he did not at that time have any shipments which were moving over the routes operated by the applicant (R. 661).

The next witness called was Dr. F. J. Hearn (R. 663). At the time of the hearing Dr. Hearn lived at Haynesville, Louisiana. However in 1933, 1934 and 1935 he was living at Longview. He lived at Longview for about four years, having gone there in the fall or summer of 1931 (R. 664). Dr. Hearn is the Applicant's half-brother (R. 664). He stated that Mrs. Callie Akin, who is his mother and also the mother of the Applicant, is also sometimes known as Mrs. L. F. Akin (R. 664). Dr. Hearn is a dentist. He and his mother had a little store and a tourist camp at Longview just a little way out of town (R. 665). Where they were located was a subdivision outside the city limits which was called Lassiter (R. 665). It was about a mile from down town. The grocery business was sometimes called the Akin Grocery and sometimes called the Hearn Grocery until they finally put up a sign "Akin Grocery" because it belonged to his mother (R. 665). They had built this tourist camp out there new. The grocery business was started either in the fall of 1931 or

early in 1932 (R. 666). Dr. Hearn ran this grocery business for a while and finally sold it (R. 667). It was under Dr. Hearn's supervision for about three years (R. 667). In the construction of the tourist camp some of the materials were shipped from Louisiana. The material was mostly lumber which was shipped from Haynesville (R. 667). There were however some hardware shipments, as well as windows and doors (R. 667). After Dr. Hearn and his mother started operating the grocery store they continued to receive shipments from Lousiana at Longview (R. 668). When shipments were delivered Dr. Hearn had received some of them and had signed a receipt for them (R. 669). He identified one such delivery receipt dated October 18, 1934 consisting of pecans and buckets of syrup (R. 669). The syrup came from Bunkie near Baton Rouge on the road to New Orleans (R. 670). He also identified a shipment dated November 12, 1934 bearing his signature, consisting of oranges and tangerines (R. 671). This shipment having originated at New Orleans and received at Longview (R. 671). He also identified a delivery receipt dated in December 1934, the day of the month not being shown. Also his signature, the shipment consisting of lumber and two bundles of windows shipped from Haynesville, Louisiana and received at Longview (R. 672). He likewise identified a shipment dated February 3, 1935, together with his signature thereon consisting of two trunks, a table and box of dental tools (R. 673). Also identified was a delivery receipt dated March 1, 1935 on which he identified his signature show-

ing receipt of a shipment consisting of a storage tank and pump from the Caddo Oil and Grease Company (R. 673). Caddo Oil and Grease Company is located at Shreveport. He identified a delivery receipt dated May 18, 1935, together with his signature thereon, covering shipment of dry goods, fixtures and groceries shipped from Shreveport, Louisiana (R. 674), and received at Longview (R. 675).

The witness stated that within his personal knowledge the Applicant had been engaged in the trucking business since about 1928, 1929, or 1930, but just in what year there the witness couldn't remember (R. 675). The witness did not remember because the Applicant had moved to Shreveport and the witness "never got in touch with him very much." (R. 676).

On cross-examination the witness stated that the tourist camp and filling station were located about a mile west of Longview on the Kilgore Road (R. 676). He was called upon to describe the place and did (R. 677). He testified that he was at this grocery store and tourist camp in the years 1933, 1934 and 1935 (R. 678). That he did not do any of the actual work of construction, but that he was there while the construction was under way (R. 678). He testified that the shipment consisting of the dry goods, groceries and fixtures was some materials which his wife had stored with his father-in-law prior to their shipment to Longview (R. 679). He said that he naturally favored his brother on

shipping where he could and that he paid the freight charges (R. 680).

On this cross-examination counsel tried to make the witness admit that he signed that particular document in 1940 but this the witness flatly denied (R. 681).

The next witness called was Ira E. Moss who lived at Shreveport where he had resided since 1925 (R. 687). He was employed by Shreveport Fertilizer Works since October 1925 when he came to Shreveport. For a period of a year just prior to the hearing he had been with the Chemical Division of the War Production Board as an analyst in Washington (R. 687). In 1934-1935 he was doing general office work for the Shreveport Fertilizer Works, but in 1936 he went on the road as a salesman for that company (R. 687-688). He was acquainted with the Applicant and had known him since the spring of 1932. Witness' friendship with the Applicant started about 1932 when Applicant was "more or less making his headquarters around our office" (R. 688). He stated that during the time that he had known him the Applicant "was building up his trucking business and hauling fertilizer and other various commodities" (R. 688).

The next witness called by the Applicant was Joseph Andrew Thomas, whose testimony is contained in deposition admitted as Exhibit No. 36 (R. 780). Thomas lives in New Orleans where he has lived since he was a boy of 16, he now being 73 years of age. Exhibit 36, Page 2. He is engaged

in the transportation, trucking and freight forwarding business and has been so engaged for 35 or 40 years and operates under a Certificate from the Interstate Commerce Commission. Exhibit 36, Page 2. His operations are conducted under MC-32368, being a certificate of convenience and necessity issued on September 7, 1942. During the years 1933, 1934, 1935 and 1936 he was operating in the same manner as he was operating at the time his testimony was given. Exhibit 36, Page 3, except that of course during the earlier years he was not required to have a certificate from the Interstate Commerce Commission. The witness first became acquainted with the Applicant Akin eight or ten years prior to the time the testimony was given. Exhibit 36, Page 4. The witness says that at the time that the Applicant "was a long distance hauler." When asked where the Applicant was operating the witness answered that "I used to give him freight to Dallas, Fort Worth and other places. Whatever he could take in the territory he covered." Exhibit 36, Page 4. He could not remember the exact time when he first began to give the Applicant freight for transportation, but said that it was "eight or ten years ago," and continuing the witness said "through that channel I became acquainted with him and began to give him freight and solicit freight for him." Exhibit 36, Page 5. Fixing the date that this relation began to the best of his ability the witness said that he knew it was a long time ago, and that "I would say 1934 or 1935, my idea of it." Exhibit 36, Page 5. The witness said

that he had been giving him freight since he first became acquainted with him and on down through the years to the present time, having given him "a truckload of freight week before last." Exhibit 36, Page 5. When asked as to whether or not the freight was to be hauled for the witness or whether or not the witness was acting in some other capacity or for some other person the witness said "Well, it was freight that I solicited and that I had a right to give to whoever I wanted to, just as I am doing today. I have several customers that I write up their freight and I give it to whatever lines or transportation that I think will give me the best service and the quickest method of delivery." Exhibit 36, Page 5. Asked as to the routes over which the Applicant was operating the witness answered "to Fort Worth and Dallas" and to the best of his knowledge operated through Shreveport. Exhibit 36, Page 6. Asked as to the various commodities which the witness had tendered the Applicant for transportation the witness said, "I don't have a great many commodities As I said before, I only gave him those commodities that I have control of rating and routing. I used to give Mr. Akin—if you want to put it in, it is all right, and, if you don't, it is all right with me—I used to give him truckloads of macaroni, noodles and spaghetti and things of that kind, and truckloads of piece goods from the Lane Cotton Mills. I gave him candy, gave him matches, and things of that kind, those goods which I had control of routing." Exhibit 36, Page 7. Those kind of shipments were

tendered to the Applicant in the years of 1934 and 1935 and "perhaps in 1936." Exhibit 36, Page 7. The witness' old records for the years 1933, 1934, 1935, 1936 were not available as he did not keep records over three years old. Exhibit 36, Page 8.

Shipments moved by the Applicant for the witness or due to his solicitation were billed by the witness. Thomas solicited freight for the Applicant on a commission basis. Exhibit 36, Page 8. And on freight secured by the witness for movement by Akin's line, Akin used the witness' docks. Exhibit 36, Page 9. And during the years 1933 to 1936 inclusive the witness' only relation with the Applicant "was the trucking business, that's all." Exhibit 36, Page 10. Witness says that he knows the type of commodities which the Applicant was hauling in those years 1933, 1934, 1935 and 1936 from the fact that the Applicant was using the witness' docks at New Orleans where the Applicant unloaded, and that from this, together with his own experience in routing shipments over the Applicant's line, that the Applicant was transporting "general commodities, different things going to different people here in New Orleans." Exhibit 36, Page 11-12. The witness also had opportunity to observe the freight that was being transported away from the docks in New Orleans "because that was handled through my office." The witness again said that "through his own services and solicitation that the Applicant was transporting cotton piece goods, macaroni, spaghetti, noodles, candy, oils,

different things." Exhibit 36, page 12. Witness also said that he knew that the Applicant was transporting "lots of stuff in to Swift & Company, because that is where I used to telephone to get in connection with his trucks when I had a load." The witness said that as to the Applicant's operation "I was kind of—what you might call a local agent for him, pick up stuff and have it ready for him when he would come in." As to the destination of most of the commodities that moved through the witness' efforts, the witness said that mostly it went to Dallas and Fort Worth. Exhibit 36, Page 13. When asked, however, as to whether or not he had shipments going to points intermediate to New Orleans and Fort Worth the witness testified that he had routed shipments to Shreveport, also to Marshall, Texas and "to other places in Texas." Some of which went beyond Fort Worth. Exhibit 36, Page 14. He also said that he had routed shipments over the Akin line to Longview, Texas, which is a point on Applicant's route to Jasper and Tyler, Texas, which were points off of Applicant's route. Exhibit 36, Page 15.

The witness solicited freight for the Applicant Akin for three or four years, beginning around in 1934. Exhibit 36, Page 17. After 1936 the witness solicited freight for D. C. Hall, one of Applicant's competitors, Exhibit 36, Page 17. This was done, however, for only about two and one-half or possibly three years. After that the witness solicited for the Applicant and gave Applicant freight for transportation. Exhibit 36, Page 17-18. Even while

the witness was soliciting for Hall if Hall didn't have a truck in New Orleans at the time he "gave it to Mr. Akin." Exhibit 36, Page 18. The witness also stated that during the time he gave shipments of the Hershey Chocolate Corporation to the Applicant for transportation, which shipments arrived in New Orleans by pool car to be distributed from the railroad car. Exhibit 36, Page 19. These shipments of chocolate moved principally to Shreveport and Alexandria, Louisiana, inasmuch as he did not ship Hershey goods to Texas. Exhibit 36, Page19. The witness did not think any of these Hershey movements occurred however in 1933, 1934 or 1935. He could not remember for sure because "I can't go too far back in all those things." Exhibit 36, Page 19. His recollection was that these Hershey movements started around 1937 and continued through 1938, 1939, 1940, 1941 and 1942. The witness also identified certain shipping documents which are abstracted in Exhibit No. 26. During the time that the witness represented the Applicant at New Orleans he "gave him everything I had going in that territory, irregardless of what the material or commodity were." Exhibit 36, Page 31. The witness said that the few shipping instruments shown him "does not state the volume; there are a great many shipments that maybe you all haven't got in there. I don't know how you keep your records, and records for five or six and seven years are certainly hard to keep. As I stated before, I haven't any of them. This doesn't begin

to state the volume of business that I gave to Mr. Akin." Exhibit 36, Page 32.

The beginning of the cross-examination was largely matters already covered by direct examination, but the witness said that he had a place of business at 545 Tchoupitoulas Street and that he also had a place of business at 1117 Calliope Street. He said that he had actual knowledge of the movements to which he testified to because he not only saw the shipping documents which went across his desk, but he also saw the trucks after they got their load of commodities and would come by the office where he would give them the bills. Exhibit 36, Page 37. Further with reference to witness' dealings with D. C. Hall and Mr. Akin the witness stated that he gave most of his shipments to D. C. Hall, that relation starting the latter part of 1936 or early part of 1937 "except certain things." Exhibit 36, Page 39. Most of the witness' records had been destroyed by a fire. Exhibit 36, Page 39. When the witness had commodities to move he either telephoned Applicant's driver or called the Applicant himself in Shreveport or Iowa, Louisiana. Exhibit 36, Page 40. In addition to that the witness said that the Applicant himself "was popping in here very often, you know." Exhibit 36, Page 40. It also developed on cross-examination that the witness was the local representative, meaning the New Orleans representative, for Lane Cotton Mills, Federico Macaroni Company and National Food Products Company. Also for the Diamond Match Company and beginning about in the year 1937

up to the present time a representative of the Hershey Chocolate Corporation. Exhibit 36, Page 41.

Questioned about various instruments which had been shown to the witness on direct examination and as to his independent recollection as to those particular documents the witness said he had no independent recollection of those particular documents and continuing he said "I could only say at that time I was doing all of the hauling for Mr. Akin and from those different people." Exhibit 36, Page 50. And when pressed on the point that he had no independent recollection he answered that he did have no independent recollection "but I don't see how anybody could have hauled it except me, because I did all of the hauling—supposed to have —at that time, and I used to send there and get their goods and load them up." Exhibit 36, Page 51. The witness also said with reference to his actually having seen the commodities on Applicant's trucks that "Akin had open trucks, some of them, and the macaroni, you know, you could see it in the back, and I know this: I could tell my truck to go up to the National Macaroni Company and get 600 or 700 or 800 boxes, and they would come back with the receipt from the factory, and I would bill it out and get a receipt from Akin, which substantiated the fact that they had that material on there. There wouldn't be any question, I don't think, in that matter." Exhibit 36, Page 52-53.

With reference to other shipments the witness had this to say "Now, let me explain this. I think I can explain this to the satisfaction of all

you gentlemen. If I had 100 or 200 cases of matches for the Diamond Match Company, I would say to Mr. Akin, 'Pull at the side door and get these 200 cases of matches,' and we would get a receipt for it. I have often seen the matches go on the truck, because my office was right in that building, and, if I would say to him, 'Now, go up and get those sixteen or eighteen bales of piece goods at Lane, he would go up and get them and bring me the receipt from the Lane Cotton Mills, which, to my mind, and I think any fair mind, would establish the fact that he had those eighteen bales on his truck." Exhibit 36, Page 53.

It also developed on cross-examination, as on direct examination, that the witness gave all of his shipments to the Applicant in the years 1933 to 1936 inclusive, prior to his starting to do business with Hall, Exhibit 36, Page 54, and by all the business that he had was meant all shipments which he had originating in or passing through New Orleans destined for Fort Worth and Dallas and intermediate points. Exhibit 36, Pages 54, 55. Just why has this testimony been disregarded?

The protestants attempted impeachment by V. M. Smith (R. 384) but the witness stated that he did receive a bird dog shipped over applicant's line (R. 386), which shipment is abstracted in Exhibit 26, third line from top of page 5. The witness was at that time in the bird dog business and there were two or three exchanges of dogs between a man named Corey and himself. Witness testified "I paid for the dog and paid for the freight."

(R. 387). He admitted the signature on the bill looked like his, but did not recall signing it. (R. 389). Would not say that the shipment of golf clubs and box of clothing did not occur. His was a negative answer "I do not know." (R. 390). He said the shipment could have been made to his mother.

The protestants attempted impeachment by Bill Philpott. He did not deny the shipment as suggested by the Commission; said he did not remember making it. (R. 394). On cross-examination he said he had known the applicant for nine years and throughout that time knew that applicant had been operating trucks through Waskom. That in fact the applicant was operating trucks through Waskom when he came there. (R. 397). And had been operating them ever since. (R. 398). He stated that he had made shipments over Akin's line and had paid the freight charges. (R. 398). Among other things the applicant had transported some shipments of liquor for him.

The protestants called W. G. DeAndrea (R. 405) to ask him about a shipment disregarded by the Commission. His only complaint was that he didn't receive as much beer as the invoice called for. (R. 407). He admitted he had made shipments of beer by Akin to New Orleans: (R. 413). One of the shipments from Longview that was disregarded was a shipment to Mrs. L. F. Akin. The impeaching testimony was the witness Emory Todd (R.

420) who said he tried to locate Mrs. Akin and couldn't find her. (R. 421-23). This is some more worthless negative testimony.

The Commission refers to Mr. McConnell's testimony as Traffic Manager of Armour & Company that he knew of applicant's operation, but considered he was a contract carrier. At that time there was in the record as part of Exhibit No. 26 a bill of two shipments on June 12, 1937 abstracted on page 14 of the exhibit showing that Armour & Company shipped 23 cases of corned beef from New Orleans to itself in Dallas, and on the same date shipped an additional 25 cases of corned beef from New Orleans to Dallas. Mr. McConnell, the protestant's witness, was not asked about these shipments. As a matter of fact he testified on page 454 of the Record: "I knew there was an Akin Truck Line operating by—well, I knew that for the reason that I saw the trucks on the highway; they were painted yellow and a light green, or some such color,—"

All shipping documents after June 1, 1935 were considered authenticated by the Commission but it refused to consider any oral testimony or Exhibit 27 containing Swift shipments.

I, A. B. Culbertson, hereby certify that a copy of the foregoing instrument has been served upon all parties to this proceeding by service upon their attorneys of record and by depositing a copy hereof in the United States mails properly addressed to each of said attorneys.

Dated at Fort Worth, Texas this 21st day of February 1946.

A. B. Culbertson.